AZMAN ABDULLAH *a*

v.

KETUA POLIS NEGARA

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA *b*
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-01-5-95]
3 OCTOBER 1996

POLICE: *Disciplinary proceedings - Reduction in rank - Whether there was denial of natural justice - Whether appellant was given right to hearing - Whether appellant had full opportunity of stating his case.* *c*

ADMINISTRATIVE LAW: *Rules of natural justice - Right to be heard - Whether oral hearing imperative - Whether written representations would suffice.* *d*

PUBLIC SERVANTS: *Disciplinary proceedings - Doctrine of condonation - Delay in taking disciplinary action - Punishment imposed not commensurate with wrongdoings - Disciplinary authority informing Public Services Department that no disciplinary proceedings were taken against appellant - Whether amounted to acts of condonation - Whether charges against appellant could stand.* *e*

EMERGENCY LEGISLATION: *Validity - Whether subsidiary legislation made under Emergency (Essential Powers) Ordinance No. 2 of 1969 saved by s. 13 of Emergency (Essential Powers) Act 1979.* *f*

EMERGENCY LEGISLATION: *Validity - Whether subsidiary legislation made under Emergency (Essential Powers) Ordinance No. 2 of 1969 preserved by Emergency (Essential Powers) Ordinance No. 77 of 1971 - Whether provisions of Interpretation Acts 1948 & 1967 apply in respect of emergency legislation - Interpretation Acts 1948 & 1967, ss. 2 & 3.* *g*

EMERGENCY LEGISLATION: *Validity - Emergency (Essential Powers) Ordinance No. 2 of 1969, s. 2(1) - "All powers and authorities" - Whether phrase includes legislative powers.* *h*

EMERGENCY LEGISLATION: *Validity - Emergency (Essential Powers) Ordinance No. 2 of 1969, s. 8 - Whether only refers to legislative powers exercisable by Director of Operations under Emergency (Essential Powers) Ordinance 1969.* *i*

EMERGENCY LEGISLATION: *Validity - Emergency (Essential Powers) Ordinance No. 2 of 1969 - Delegation of power - Whether delegation of power in direct conflict with s. 11 of Delegation of Powers Act 1956 - Whether Delegation of Powers Act 1956 applies to Federal Constitution.*

EMERGENCY LEGISLATION: *Validity - The Police (Conduct and Discipline) (Junior Police Officers And Constables) Regulations 1970 - Whether made under Police Act 1967 - Whether Police Act 1967 is still in force - Whether Police Act 1967 ever repealed - Whether Regulations still in force - Whether orders made by police disciplinary authority valid.*

STATUTORY INTERPRETATION: *Canons of construction - Generalibus specialia derogant - Application of.*

ADMINISTRATIVE LAW: *Judicial review - Certiorari, application for - Whether Court only concerned with decision-making process - Whether concerned with substantive decision - Whether an appeal from the decision - Whether merely a review of the manner in which decision was made - Whether function of Court to consider merits of facts and fairness of decision.*

The appellant, a police sub-inspector with the Royal Malaysian Police, was demoted to the rank of sergeant major by the respondent pursuant to disciplinary proceedings taken against him under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations'). The appellant then applied to the High Court for leave to issue an order of *certiorari* to quash the decision of the respondent, arguing that: (i) there was a denial of natural justice in that he was not given the opportunity to be heard; and (ii) that the respondent's delay in taking disciplinary action had amounted to condonation. The application was disallowed and the appellant appealed.

In the instant appeal, the appellant submitted, firstly, that he was not given the opportunity to be heard, which was a breach of the rules of natural justice.

Secondly, the appellant contended that he had, on 1 December 1990, applied to retire optionally on 1 December 1991, and that the Police Department ('the PD') had written to the Public Services Department ('the PSD') on 26 March 1991 confirming that the appellant was free from any disciplinary action. The PSD subsequently approved the appellant's application for retirement on 29 August 1991. Based on this, the appellant submitted that: (i) there was considerable delay by the respondent in taking the disciplinary action as evinced by the dates of the charges brought against the appellant dating from 30 October 1986 to 7 March 1990; and (ii) by informing the PSD that there was no disciplinary proceedings against the appellant, the respondent had either

overlooked, forgiven, approved or sanctioned his wrongdoings. The appellant submitted that in condoning the wrongdoings in this manner, and in imposing punishment not commensurate with the wrongdoings, the decision of the police disciplinary authority was invalid and of no effect.

The appellant also raised a new point which was not raised in the Court below, i.e., that the regulations were made pursuant to s. 96 of the Police Act 1967 ('the PA') read with s. 2 of the Emergency (Essential Powers) Ordinance No. 2 of 1969 ('the 2/69 Ordinance') which was no longer in force when the respondent made the charges against the appellant in October 1991. The appellant submitted that the Yang di-Pertuan Agong ('the DYMM') had promulgated, on 19 February 1971, the Emergency (Essential Powers) Ordinance No. 77 of 1971 ('the 77/71 Ordinance'), s. 3 of which clearly states, without any saving provision, that "the Emergency (Essential Powers) Ordinance No. 2 of 1969 is hereby repealed." Alternatively, the appellant argued that there had been a wrongful delegation of powers to the Director of Operations ('the DOA') to make regulations. It was submitted that s. 2 (1) of the 2/69 Ordinance appears to be in direct conflict with s. 11 of the Delegation of Powers Act 1956 ('the DOPA'). The appellant argued that if the words "powers and authorities" in s. 2(1) of the 2/69 Ordinance were read as or construed to include legislative powers and authorities, then s. 2(1) of the 2/69 Ordinance would clearly be in conflict with s. 11 of the DOPA. The appellant further submitted that the DYMM could not have delegated the legislative powers conferred on him by s. 96 of the PA, and that the Regulations made by the DOA pursuant to such purported delegated powers were invalid and, consequently, the disciplinary action taken against the appellant pursuant to the Regulations and the resulting demotion were null and void.

The respondent submitted that the Regulations were made under the PA and that the DOA had made them under the 2/69 Ordinance by virtue of an instrument delegating the power to him. It was the respondent's contention that the DOPA does not apply to a delegation of power by the DYMM under the Federal Constitution ('the FC'). Referring to art 150 cl (2) of the FC, the respondent submitted that the DYMM could validly delegate his powers to the DOA to make the Regulations. It was argued that the DOPA is a general law and that the general provisions therein cannot in any way override the special provisions of s. 2 (1) of the 2/69 Ordinance and art 150 cl (2) of the FC on the principle of *generalibus specialia derogant*.

Held:

Per Abdul Malek Ahmad JCA (delivering the judgment of the Court):

[1] The actual hearing of the disciplinary proceedings took two days and it would, thus, be quite absurd to imagine that during that period of time the appellant was not given a chance to cross-examine his opponent's witnesses or to state his case either orally or in writing. In fact, there was evidence that the appellant had attended the hearing and had pleaded guilty to some of the charges. Consequently, the appellant's contention that there was a denial of natural justice must fail.

[2] The respondent's delay in taking disciplinary action against the appellant must surely be an act of condonation. Had the issue of condonation been taken into consideration in the Court below, the trial Judge's decision would surely have been the other way. Consequently, the charges against the appellant could not stand.

[3] Section 13 of the Emergency (Essential Powers) Act 1979 ('the EA') refers only to the Emergency (Essential Powers) Ordinance 1969 ('the 1/69 Ordinance'). The 2/69 Ordinance is not affected and, consequently, the subsidiary legislation made under it are not saved by the EA.

[3a] In normal circumstances, having regard to s. 28 of the Interpretation Acts 1948 & 1967 ('the IA'), the 77/71 Ordinance would have been able to preserve the subsidiary legislation made under the 2/69 Ordinance. However, ss. 2 & 3 of the IA strongly indicate that the provisions of the IA have no application in respect of emergency legislation.

[3b] The words "all powers and authorities" in s. 2(1) of the 2/69 Ordinance must include legislative powers as well because the sub-section starts off with "the executive authority." If legislative powers were to be excluded the words "all" would not have been used at all and the word "executive" would have been more apt and appropriate.

[3c] Section 8 of the 2/69 Ordinance only refers to legislative powers to be exercised by the Director of Operations under the 1/69 Ordinance.

[3d] The delegation of power was not in direct conflict with s. 11 of the DOPA as the DOPA does not apply to the Federal Constitution under which the 2/69 Ordinance was made.

[3e] The opening paragraph of the Regulations indicates that they were actually made under the PA which is still in force and which has never been repealed. Accordingly, the subsidiary legislation thereunder, namely

the Regulations, are still in force, and the orders made by the police disciplinary authority were validly made.

Obiter dictum:

[1] It is settled law that in a judicial review by way of an application for *certiorari*, the Court is only concerned with the decision-making process and not with the decision. It is not an appeal from the decision made but a review of the manner in which it was made; it is not the Court's function to consider whether, on the merits of the facts of the case, the said decision was fair and reasonable.

[Appeal allowed; reinstatement ordered from date of demotion to date of optional retirement]

*[**Bahasa Malaysia** Translation of Headnotes]*

POLIS: *Prosiding tatatertib - Penurunan pangkat - Samada terdapatnya penafian keadilan asasi - Samada perayu diberi hak kepada pembicaraan - Samada perayu mempunyai peluang yang sepenuhnya bagi menyatakan kesnya.*

UNDANG-UNDANG PENTADBIRAN: *Kaedah-kaedah keadilan asasi - Hak untuk didengar - Samada perbicaraan lisan sangat mustahak - Samada pengemukaan bertulis memadai.*

PENGKHIDMAT AWAM: *Prosiding tatatertib - Doktrin pemaafan - Kelewatan dalam mengambil tindakan tatatertib - Hukuman yang dikenakan tidak setimpal dengan kesalahan - Pihak berkuasa tatatertib memaklumkan Jabatan Perkhidmatan Awam bahawa tiada prosiding tatatertib telah diambil terhadap perayu - Samada membawa kepada perbuatan pemaafan - Samada tuduhan terhadap perayu boleh dipertahankan.*

PERUNDINGAN DARURAT: *Keesahan - Samada perundangan subsidiari yang dibuat di bawah Ordinan (Kuasa-Kuasa Perlu) Darurat No. 2 Tahun 1969 dikecualikan oleh s. 13 Akta Darurat (Kuasa-Kuasa perlu) 1979.*

PERUNDANGAN DARURAT: *Keesahan - Samada perundangan subsidiari yang dibuat di bawah Ordinan (Kuasa-Kuasa Perlu) Darurat No. 2 Tahun 1969 dikekalkan oleh Ordinan (Kuasa-Kuasa Perlu) Darurat No. 77 Tahun 1971 - Samada peruntukan-peruntukan Akta Pentafsiran 1948 & 1967 terpakai berhubung dengan perundangan darurat - Akta-akta Pentafsiran 1948 & 1967, ss. 2 & 3.*

PERUNDANGAN DARURAT: *Keesahan - Ordinan Darurat (Kuasa-Kuasa Perlu) No. 2 Tahun 1969, s. 2(1) - Kesemua kuasa dan pihak berkuasa - Samada ungkapan termasuk kuasa-kuasa perundangan.*

PERUNDANGAN DARURAT: *Keesahan - Ordinan Darurat (Kuasa-kuasa Perlu) No. 2 Tahun 1969, s. 8 - Samada ianya hanya merujuk kepada kuasa-kuasa perundangan yang boleh dilaksanakan oleh Pengarah Operasi di bawah Ordinan Darurat (Kuasa-kuasa Per1u) 1969.*

PERUNDANGAN DARURAT: *Keesahan - Ordinan Darurat (Kuasa-Kuasa Perlu) No. 2 Tahun 1969 - Perwakilan kuasa - Samada perwakilan kuasa bertentangan secara terusnya dengan s. 11 Akta Perwakilan Kuasa 1956 - Samada Akta Perwakilan Kuasa 1956 terpakai kepada Perlembagaan Persekutuan.*

PERUNDANGAN DARURAT: *Keesahan - Peraturan Polis (Kelakuan dan Tatatertib) (Konstabal dan Pegawai Polis Rendah) 1970 - Samada di buat di bawah Akta Polis 1967 - Samada Akta Polis 1967 masih berkuatkuasa - Samada Akta Polis 1967 pernah dimansuhkan - Samada peraturan-peraturan masih berkuatkuasa - Samada perintah-perintah yang dibuat oleh pihak berkuasa tatatertib polis sah.*

TAFSIRAN BERKANUN: *Kaedah-kaedah pembentukan - Generalibus specilia derogant - Pemakaian.*

UNDANG-UNDANG PENTADBIRAN: *Semakan kehakiman - Certiorari, permohohan untuk mendapatkan - Samada Mahkamah hanya mengambil berat dengan proses membuat keputusan - Samada mengambil berat akan keputusan substantif - Samada suatu rayuan daripada keputusan - Samada hanya merupakan satu semakan akan cara dalam mana keputusan dibuat - Samada fungsi Mahkamah untuk menimbangkan merit-merit fakta dan keadilan keputusan.*

Perayu, yang merupakan seorang inspekter rendah polis dengan pasukan Polis Di Raja Malaysia, telah diturunkan kepada pangkat sarjan mejar oleh responden selaras dengan prosiding tatatertib yang diambil terhadap beliau di bawah Peraturan-peraturan Polis (Kelakuan dan Tatatertib) (Konstabal dan Pegawai Rendah Polis) 1970 ('Peraturan-peraturan tersebut') perayu kemudiannya telah memohon kepada Mahkamah Tinggi untuk mendapatkan kebenaran bagi mengeluarkan satu perintah *certiorari* bagi membatalkan keputusan responden itu, dengan alasan bahawa (i) telah berlaku penafian keadilan asasi iaitu beliau telah tidak diberi peluang untuk didengar; dan (ii) bahawa kelewatan responden dalam mengambil tindakan tatatertib telah membawa kepada pemaafan. Permohonan tersebut telah tidak dibenarkan dan perayu merayu.

Dalam rayuan semasa, perayu telah berhujah, pertamanya, bahawa beliau telah tidak diberi peluang untuk didengar, yang mana adakan suatu kemungkiran akan kaedah-kaedah keadilan asasi.

Keduanya, perayu menegaskan bahawa beliau telah, pada 1 Disember 1990, memohon untuk bersara secara opsyenal pada 1 Disember 1991, dan bahawa Jabatan Polis ('JP tersebut') telah menulis kepada Jabatan Perkhidmatan Awam ('JPA tersebut') pada 26 Mac 1991 mengesahkan bahawa perayu adalah bebas daripada apa-apa tindakan tatatertib. JPA kemudiannya telah meluluskan permohonan perayu untuk bersara pada 29 Ogos 1991. Berdasarkan perkara ini, perayu telah berhujah bahawa: (i) terdapatnya kelewatan yang amat sangat oleh responden dalam mengambil tindakan tatatertib sepertimana yang diterangkan oleh tarikh-tarikh tuduhan yang dibawa terhadap perayu yang bertarikh sejak 30 Oktober 1986 hingga 7 Mac 1990; dan (ii) dengan memaklumkan JPA bahawa tidak terdapat providing tatatertib terhadap perayu, responden telah samada gagal untuk mengambil perhatian, telah memaafkan, melulusan dan menyetujui perbuatan-perbuatan salahnya. Perayu berhujah bahawa dalam membiarkan perbuatan-perbuatan salah dengan cara yang sedemikian, keputusan pihak berkuasa tatatertib polis adalah tak sah dan tidak berkesan.

Perayu telah juga membangkitkan satu perkara yang baru yang mana telah tidak dibangkitkan dalam Mahkamah di bawah, iaitu, bahawa Peraturan-peraturan telah dibuat selaras dengan s. 96 Akta Polis 1967 ('AP tersebut') yang dibaca bersama-sama dengan Ordinan Darurat (Kuasa-Kuasa Perlu) No. 2 Tahun 1969 ('Ordinan 2/69 tersebut') yang mana tidak lagi berkuatkuasa ketika responden membuat tuduhan-tuduhan terhadap perayu dalam bulan Oktober 1991. Perayu telah berhujah bahawa yang di Pertuan Agong ('DYMM') telah mengisytiharkan, pada 19 Februari 1971, Ordinan Darurat (Kuasa-Kuasa Perlu) No. 77 Tahun 1971 ('Ordinan 77/71 tersebut'), s. 3 yang mana dengan jelasnya menyatakan, tanpa apa-apa peruntukan berkecuali, bahawa "Ordinan Darurat (Kuasa-Kuasa Perlu) No. 2 Tahun 1969 adalah dengan ini dimansuhkan." Secara alternatifnya, perayu berhujah bahawa telah berlaku perwakilan secara salah akan kuasa-kuasa kepada Pengarah Operasi ('DOA tersebut') untuk membuat peraturan-peraturan. Telah dihujahkan bahawa s. 2(1) Ordinan 2/69 tersebut kelihatan seperti bertentangan secara langsung dengan s. 11 Akta Kuasa-kuasa Perwakilan 1956 ('DOPA'). Perayu berhujah bahawa jika perkataan-perkataan "kuasa-kuasa dan pihak-pihak berkuasa" dalam s. 2(1) Ordinan 2/69 dibaca sebagai atau ditafsirkan bagi memasukkan kuasa-kuasa dan pihak-pihak berkuasa perundangan, maka s. 2(1) Ordinan 2/69 akan dengan jelasnya menjadi bertentangan dengan s. 11 DOPA tersebut. Perayu selanjutnya berhujah bahawa DYMM tidak mungkin telah mewakilkan kuasa-kuasa perundangan yang diberikan padanya oleh s. 96 PA, dan bahawa peraturan-

peraturan yang dibuat oleh DOA selaras dengan kuasa-kuasa yang telah diwakilkan sedemikian dan, akibatnya, tindakan tatatertib diambil terhadap perayu selaras dengan peraturan-peraturan tersebut dan penurunan pangkat yang diakibatkan olehnya adalah batal dan tak sah.

Responden telah berhujah bahawa peraturan-peraturan tersebut telah dibuat di bawah PA dan bahawa DOA telah dibuat di bawah Ordinan 2/69 menurut suatu suratcara yang mewakilkan kuasa tersebut kepada beliau. Ianya merupakan penegasan responden bahawa DOPA tersebut tidak terpakai kepada perwakilan kuasa oleh DYMM di bawah Perlembagaan Persekutuan ('FC tersebut'). Merujuk kepada per. 150 fasal (2) FC tersebut, responden berhujah bahawa DYMM boleh secara sahnya mewakilkan kuasa-kuasa baginda kepada DOA untuk membuat peraturan-peraturan tersebut. Adalah dihujahkan bahawa DOPA adalah undang-undang am dan bahawa peruntukan-peruntukan am di dalamnya tidak boleh dalam apa cara pun melangkaui peruntukan-peruntukan khas s. 2(1) Ordinan 2/69 per. 150 fasal (2) FC tersebut atas prinsip *generalibus specialia derogant.*

Diputuskan:

Oleh Abdul Malek Ahmad HMR (menyampaikan penghakiman Mahkamah):

[1] Pembicaraan sebenar prosiding tatatertib itu telah mengambil masa selama dua hari dan ianya adalah, dengan itu boleh dikatakan agak mustahil bahawa dalam tempoh masa yang sebegitu, perayu telah tidak diberi peluang untuk memeriksa balas saksi-saksi pihak lawannya atau pun untuk menyatakan kesnya samada secara lisan atau secara bertulis. Malahan, terdapat keterangan bahawa perayu telah menghadir pembicaraan dan telah memplid bersalah kepada sebahagian daripada tuduhan-tuduhan tersebut. Akibatnya, penegasan perayu bahawa terdapatnya penafian keadilan asasi seharusnya gagal.

[2] Kelewatan responden dalam mengambil tindakan tatatertib terhadap perayu tentu sekali merupakan suatu perbuatan pemaafan. Sekiranya isu pemaafan telah diambil kira dalam Mahkamah di bawah, keputusan Hakim perbicaraan sudah pasti sebaliknya. Akibatnya, tuduhan-tuduhan terhadap perayu tidak dapat dikekalkan.

[3] Seksyen 13 Akta Darurat (Kuasa-Kuasa per1u) 1979 ('EA tersebut') merujuk hanya kepada Ordinan Darurat (Kuasa-Kuasa Per1u) 1969 ('Ordinan 1/69'). Ordinan 2/69 tidak terjejas dan, akibatnya perundangan subsidiari yang dibuat dibawahnya tidak dikecualikan oleh EA tersebut.

[3a] Dalam keadaan biasa, menimbangkan s. 28 Akta Pentafsiran 1948 & 1967 ('IA tersebut'), Ordinan 77/71 akan dapat mengekalkan perundangan subsidiari yang dibuat di bawah Ordinan 2/69. Walaubagaimana pun, ss. 2 & 3IA tersebut dengan tegasnya menunjukkan bahawa peruntukan-peruntukan IA tidak terpakai berhubung dengan perundangan darurat.

[3b] Perkataan-perkataan "all powers and authorities" dalam s. 2(1) Ordinan 2/69 mestilah termasuk kuasa-kuasa perundangan juga kerana seksyen-kecil bermula dengan "the executive authority". Jika kuasa-kuasa perundangan hendak dikeluarkan perkataan "all" tidak akan digunakan sama sekali dan perkataan "executive" adalah lebih sesuai dan wajar.

[3c] Seksyen 8 Ordinan 2/69 hanya merujuk kepada kuasa-kuasa perundangan untuk dilaksanakan oleh Pengarah Operasi di bawah Ordinan 1/69.

[3d] Perwakilan kuasa bukannya bertentangan secara terus dengan s. 11 DOPA tersebut kepada DOPA tidak terpakai pada Perlembagaan Persekutuan di bawah yang mana Ordinan 2/69 telah dibuat.

[3e] Perenggan pembukaan peraturan-peraturan tersebut menunjukkan bahawa ianya sebenarnya telah dibuat di bawah PA yang mana masih berkuatkuasa dan tidak pernah dimansuhkan. Berikutan itu, perundangan subsidiari di bawahnya, iaitu peraturan-peraturan tersebut, masih berkuatkuasa, dan perintah-perintah yang dibuat oleh pihak berkuasa tatatertib polis telah dibuat dengan sah.

Obiter dictum:

[1] Ianya merupakan undang-undang yang telah lama diamalkan bahawa dalam sesuatu semakan kehakiman melalui suatu permohonan untuk *certiorari,* Mahkamah hanya mengambil-berat akan proses membuat keputusan dan bukannya dengan keputusan itu. Ianya bukan merupakan rayuan daripada keputusan yang dibuat tetapi suatu semakan akan cara dalam mana ianya dibuat; ianya bukannya merupakan fungsi Mahkamah untuk menimbangkan samada, berdasarkan merit fakta-fakta kes tersebut, keputusan tersebut adalah adil dan berpatutan.

[Rayuan dibenarkan; pengembalian semula ke jawatan diperintahkan daripada tarikh penurunan pangkat sehingga kepada tarikh persaraan opsyenal]

Cases referred to:

Najar Singh v. Government of Malaysia & Anor. [1976] 1 MLJ 203 ***(foll)***

Johore Mining & Stevedoring Co. Ltd. v. All Malayan Mining Industry Staff Union [1967] 2 MLJ iii ***(refd)***

District Council, Amraoti v. Vithal Vinayak AIR [1941] Nagpur 125 ***(refd)***

L.W. Middleton v. H. Playfair AIR [1925] Calcutta 87 ***(refd)***
Phillips v. Foxall [1872] LR Vol. VII 666 ***(refd)***
Gulwant Singh v. Abdul Khalik [1965] 2 MLJ 55 ***(cit)***
Letchumi & Anor. v. The Asia Insurance Co. Ltd. [1972] 2 MLJ 105 ***(cit)***
Connecticut Fire Insurance Co. v. Kavanagh [1892] AC 473 ***(cit)***
Mohd. Azam Shuja & Ors. v. United Malayan Banking Berhad [1995] 2 MLJ 851 ***(cit)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor. [1996] 2 CLJ 771; [1996] 1 MLJ 261 ***(cit)***
Watson v. Winch [1916] 1 KB 688 ***(cit)***
Harish Chandra v. State of Madhya Pradesh AIR [1965] SC 932 ***(cit)***
Daihatsu (Malaysia) Sdn. Bhd. v. Pendakwa Raya [1987] 1 MLJ 88 ***(cit)***
Johnson Tan Han Seng v. Public Prosecutor & 3 Other Cases [1977] 2 MLJ 66 ***(refd)***
Public Prosecutor v. Chew Siew Luan [1982] 2 MLJ 119 ***(cit)***
Public Prosecutor v. Khong Teng Khen & Anor. [1976] 2 MLJ 166 ***(refd)***
Low Chang Hian v. Kelab Golf DiRaja Selangor [1996] 2 CLJ 309; [1995] 3 MLJ 1 ***(refd)***
Murphy v. Duke [1985] 2 All ER 274 ***(refd)***
Barker v. Edger and Others [1898] AC 748 ***(refd)***
R v. Camberwell City Council, ex parte Heller & Gocs [1965] VR 491 ***(cit)***
Sanwarmal Kejriwal v. Vishwa Co-operative Housing Society Ltd. AIR [1990] SC 1563 ***(refd)***
Government of Malaysia v. Mahan Singh ***(foll)***

Legislation referred to:

Constitution (Amendment) Act 1981
Delegation of Powers Act 1956, ss. 2(1), 3, 11
Emergency (Essential Powers) Act 1979, s. 13
Emergency (Essential Powers) Ordinance 1969
Emergency (Essential Powers) Ordinance No. 2, 1969, ss. 2, 2(1), 8, 13
Emergency (Essential Powers) Ordinance No. 77, 1971, s. 3
Essential (Security Cases) Regulations 1975
Federal Constitution, Arts. 39, 150 cll. 2, 2B, 2C, 8(b)(iii)
Interpretation Acts 1948 and 1967, ss. 2, 3, 23, 23(1), 28
Police Act 1967, s. 96, 96(1), 96(2)(b)
Police (Conduct and Discipline) (Junior Police Officers And Constables) Regulations 1970
Regulations and the Public Officers (Conduct and Discipline) (General Order Chapter D) Regulations 1969 [UK]
Rules of the Court of Appeal 1994, r. 18(2)
Rules of the High Court 1980, O. 14, O. 32 r. 13(2)

Other sources referred to:

De Smith's Judicial Review of Administrative Action, pp. 200 & 201
Principles of Statutory Interpretation, Guru Prasanna Singh, 5th Edn., 1992, p. 396
Statutory Interpretation, Donald Gifford, 1990 Edn., p. 105

[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: R1-25-152-1991]

For the appellant - Oh Choong Ghee; M/s. Shafee & Co.
For the respondent - Abu Bakar Jais, Senoir Federal Counsel

JUDGMENT

Abdul Malek Ahmad JCA:

Having served in the Royal Malaysia Police from 1 October 1964 and having been promoted to the rank of Sub-inspector on 1 January 1987, one can expect the appellant to be upset when he received a letter dated 10 October 1991 on 21 October 1991 from the police disciplinary authority listing out eight disciplinary charges against him under the Police (Conduct and Discipline) (Junior Police Officers And Constables) Regulations 1970 (hereinafter 'the Regulations').

The appellant had replied on 6 November 1991 claiming trial to all eight charges and the disciplinary proceedings had been conducted on 11 and 13 November 1991 whereupon the appellant was found guilty on the first, second, third, seventh and eighth charges but acquitted on the fourth, fifth and sixth charges. The punishment imposed was a reduction in rank from Sub-inspector to Sergeant Major, the post he had held before his promotion in 1987.

It is quite unnecessary to reproduce the eight charges here and it would suffice to state that the first charge related to the appellant's failure to maintain a detective service journal between 30 October 1986 to 2 September 1989; the second concerned the failure to produce his pocket book to his superior as directed on various dates between 10 January 1988 to 2 February 1989; and the third was as a result of his failure to declare as his assets as on 2 September 1989 one Isuzu Trooper No. BCJ 2766, one Ford Laser S No. BCD 9163, one Daihatsu Charade No. WBD 6184 and one house at No. 15 Jalan Bunga Melor 8, Taman Muda Ampang, Selangor. The other five charges were as regards what allegedly took place on the morning of 7 March 1990. The fourth charge was for his failure to report for duty that date between 8a.m. and 12.30p.m.; the fifth was for his non-attendance at a briefing at 9a.m. also on that same date; the sixth was for not informing his superior between 8a.m. and 12.30 p.m. on the said date of his whereabouts; the seventh was for making a false entry in his pocket book that at 8.05a.m. on that date he was at work when he was actually at Ah Fook coffee shop opposite the police station; and the eighth was for not applying for medical leave at 12.30p.m. on that date having earlier gone for medical treatment at a private clinic.

His *ex parte* notice of motion dated 23 December 1991 for leave to issue an order of *certiorari* under O. 53 of the Rules of the High Court 1980, originally against the respondent and three others namely the Minister of Home Affairs, the Inspector-General of Police and the Government of Malaysia as well, had been granted against the respondent alone on 6 July 1993 with costs in the cause. There is nothing in the records to explain why and how the names of the other three respondents were deleted in the process.

The relevant notice of motion dated 12 July 1993 had been fixed on 26 January 1994 but was finally heard on 3 January 1995. Incidentally, these dates are given to show the unexplained delay from the time leave was applied for until the matter was eventually disposed of at first instance.

Before we proceed to discuss the merits of this appeal, it is appropriate to mention two other matters. The first is that the appellant did apply on 6 November 1991 for a week's postponement of the disciplinary hearing because the Indian police officer who was going to represent him would be on leave, because of Deepavali or the Festival of Lights. Obviously, the application was not granted as the hearing did go on the scheduled date but without the records being produced, we are unable to determine whether the officer representing him did appear or otherwise. The second is that the appellant had applied for optional retirement to take effect on 1 December 1991 by letter dated 1 December 1990 and the Public Services Department by letter dated 4 October 1991 had informed the police department that they had approved the application on 29 August 1991. This fact is important because the respondent's letter listing out the eight charges was dated 10 October 1991.

As at the hearing before the learned trial Judge, learned Counsel for the appellant has raised a number of grounds before us which from an overall perspective could be conveniently dealt with under two headings.

The first is as regards the breach of the rules of natural justice meaning simply that the appellant was not given an opportunity to be heard. This argument is definitely on flimsy ground as although we and the learned trial Judge had not been furnished with the relevant notes of the disciplinary proceedings, it is not disputed that the appellant did attend the hearings on 11 and 13 November 1991. What is of vital importance is that the appellant should have a full opportunity of stating his case before the punishment is meted out. Whether he presented a case of substance is not known in the absence of the notes of the disciplinary proceedings. As for the request for a postponement, there is no clear evidence as to whether it was rejected or whether the officer chosen to represent the appellant by the appellant himself did attend the hearings or otherwise. Instead, there is evidence that the appellant had in fact pleaded guilty to the first and second charges.

At this juncture, it may be pertinent to reproduce the speech of Viscount Dilhorne on this point in the course of delivering the judgment of the Judicial Committee in *Najar Singh v. Government of Malaysia & Anor*. [1976] 1 MLJ 203:

> The appellant does not complain that he was not informed in writing of the grounds on which his dismissal was to be considered. He does not complain of a breach of reg. 27 in that respect. His complaint is that he was not given an opportunity of being heard orally before being dismissed and he contends that reg. 27, which in this respect follows Art. 135(2) of the Constitution, requires that before being dismissed he should have been given such an opportunity. He contends that "being heard" means "being heard orally."
>
> The word "heard" does not invariably connote an oral hearing. It can be used and is not infrequently used in relation to something written. The question, "Have you heard from X?", often means, "Have you had a letter from X?". Its meaning must depend on the context in which it is used and the context in which it is used in these regulations shows that in reg. 27 it cannot have been intended only to mean an oral hearing. Regulation 27 has to be read with reg. 30 and that makes no provision for an oral hearing if the officer fails to make representations in writing or the representations he makes in writing do not exculpate him. It is only if a committee of inquiry is appointed that he will be given the opportunity of giving oral evidence.
>
> In their Lordships' opinion reg. 27 is not to be interpreted as imposing an obligation to hear an officer orally.
>
> In a number of cases the argument has been put forward that the omission to hear a party orally was contrary to natural justice. In *Local Government Board v. Arlidge* [1915] AC 120 evidence had been given on behalf of Mr. Arlidge at a public inquiry but he claimed to be entitled to be heard orally by the Local Government Board to which he was appealing before they decided his appeal. The House decided that he was not so entitled, Viscount Haldane LC saying at p. 134:
>
> > I do not think the Board was bound to hear the respondent (Arlidge) orally, provided it gave him the opportunities he actually had.
>
> In *The King v. Housing Appeal Tribunal* [1920] 3 KB 334 the appeal tribunal, having received the appellant's notice of appeal and the local authority's statement in reply, dismissed the appeal. It was held that under the rules of procedure applicable, the appeal tribunal might dispense with an oral hearing but that they were bound to give the appellant a hearing in the sense of an opportunity of putting his case, Sankey J, as he then was, saying at p. 346:
>
> > Now a hearing in my view need not be an oral one, it may be on written representations.

In *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578 Lord Wilberforce at p. 1594 said:

> The appellant (a teacher) is entitled to complain if, whether in procedure or in substance, essential requirements, appropriate to his situation in the public service under the respondents, have not been observed, and, in case of non-existence, to come to the Courts for redress.
>
> The particular principle of administrative law to which he appeals is that, before his dismissal became effective, he ought to have been given an opportunity of making written representations to or of being heard by the education authority ... . The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make.

In this passage which was cited by Counsel on behalf of the appellant, the context shows that the words "being heard" meant "being heard orally" but this passage is no support for the proposition that unless there is an oral hearing, there is a denial of natural justice. Indeed it points in the opposite direction. What is important is that the officer concerned should have a full opportunity of stating his case before he is dismissed. The Chapter D Regulations 1969 provided this and the appellant availed himself of the opportunity, though as the content of his representations was not disclosed, their Lordships are unable to say whether he presented a case of substance.

Accordingly, the Privy Council in that case had in dealing with the validity of both the Regulations and the Public Officers (Conduct and Discipline) (General Order Chapter D) Regulations 1969 had opined in their penultimate paragraph that:

> In the circumstances the plea by the appellant that there was a denial of natural justice must in their Lordships' opinion be rejected. As this plea was put forward, their Lordships have dealt with it though as the Regulations, which have the force by law, lay down a detailed procedure which was followed in this case, their Lordships do not consider that such a plea was really open to the appellant.

In our case, the actual hearing took two days and it would be quite absurd to imagine that during that period of time the appellant was not given a chance to cross examine his opponent's witnesses or to state his case either orally or in writing. In *De Smith's Judicial Review of Administrative Action* at pp. 200 and 201 it is stated:

> What the *audi alteram partem* rule guarantees is an adequate opportunity to appear and be heard (subject to the proviso that in some situations prior notice may be valid although not in fact received). The rule does not guarantee that a hearing or inspection shall never proceed or that action shall never be taken to

> a person's detriment unless everyone entitled to appear does in fact appear. There are indeed situations in which it will normally be unjust to proceed with a hearing in the absence of a person liable to sustain serious detriment by the outcome; but it may still be justifiable in such situations to proceed if that person has absented himself without reasonable cause. Clearly it will not be justifiable to proceed if the time or place fixed for a hearing is such that an interested party cannot reasonably be expected to attend or (if he attends) to be able to prepare his case properly.

On these considerations, this ground fails.

The second concerns the doctrine of condonation. This stems from the fact that the appellant had on 1 December 1990 applied to retire optionally on 1 December 1991 and the police department had written to the Public Services Department on the matter on 26 March 1991 furnishing all the documents and stating in no uncertain terms that it is confirmed that the appellant is free from any disciplinary action.

On 4 October 1991, the Public Services Department had replied saying that they had already approved the appellant's application on 29 August 1991. Following the disciplinary proceedings on 11 and 13 November 1991, the police department had written to the Public Services Department on 30 November 1991 to inform them that disciplinary action had been taken against the appellant and that he had been reduced in rank from Sub-inspector to Sergeant Major.

The grouse of the appellant is that in view of the dates in the charges levelled against him dating from 30 October 1986 to 7 March 1990 which strongly indicated considerable delay in taking action, and telling the Public Services Department earlier in the same year namely in 1991 that there was no disciplinary proceedings against him, the respondent had either overlooked, forgiven, approved or sanctioned his wrongdoings and they were acting in bad faith when they took action against him after the appellant had made, and the police department had supported, his application for optional retirement, and after the Public Services Department had given their approval. Consequently, in condoning the offences in this manner and in imposing a punishment not commensurate with the offences, the appellant contends the decision of the police disciplinary authority was invalid and of no effect.

Learned Counsel for the appellant had referred to four authorities. In *Johore Mining & Stevedoring Co. Ltd. v. All Malayan Mining Industry Staff Union* [1967] 2 MLJ iii before the Industrial Arbitration Tribunal, it was held:

> Incidents prior to the incidents leading to the termination of the storekeeper's services had been waived by the company and should not be taken into account by the tribunal in its consideration of the issue as to whether or not such termination was justified.

In *District Council, Amraoti v. Vithal Vinayak* AIR [1941] Nagpur 125, the Court said:

> Once a master has condoned any misconduct which would have justified dismissal or a fine, he cannot after such condonation go back upon his election to condone and claim a right to dismiss him (servant) or impose a fine or any other punishment in respect of the offence which has been condoned. This rule is to be found in AIR [1925] Cal 87 (*L.W. Middleton v. H. Playfair* (11)) and in many other cases. The reason is obvious. A servant even though he misconducts himself has a right to seek other employment, and it is proper and just that he should be given the earliest opportunity of seeking such fresh employment. As time goes by and he grows older, his chances of obtaining employment grow less and less. Therefore the rule is that a servant must be dismissed at once or given the chance of serving upon a fresh contract. If no such terms are imposed then clearly new terms cannot be imposed at some later date after the election to condone has been made, for the simple reason that had these conditions been put forward at the time, the servant might have preferred dismissal and the opportunity of obtaining other service. That is the reason underlying the rule which, in my opinion, is a fair, just and proper one.

The relevant finding in *L.W. Middleton v. H. Playfair* AIR [1925] Calcutta 87 was as follows:

> We have been pressed to hold on behalf of Middleton that he was constrained to act as he did, because the conduct of Playfair had seriously prejudiced the interest of the estate, and that he could have fully justified his action even if he had dispensed with his services under cl. 9 of the agreement. In our opinion, it would be fruitless to investigate whether Playfair had or had not misconducted himself so as to justify his dismissal by Middleton. If a master on discovering that his servant has been guilty of misconduct which would justify a dismissal, yet elects to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned.

On the same point, the Court of Queen's Bench in *Phillips v. Foxall* [1872] LR Vol. VII 666 ruled as follows:

> Now the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned.

As for the facts in this case, the relevant officer in the police department had explained that he had made a mistake when he told the Public Services Department that there was no disciplinary action against the appellant when he actually knew there was. When a particular disciplinary action commences is a separate issue altogether but in this case it is our view that it must begin

when investigations are initiated and this must well be before the police disciplinary authority informs the person concerned the charges he has to face which in this particular instance was only by the letter dated 10 October 1991. The statement that the appellant was free of any disciplinary action was written on 26 March 1991 and from the admission of the mistake, investigations had in fact commenced by then. Although at that point of time there were no disciplinary proceedings taken against the appellant as yet, the police department was already aware of the wrongdoings of the appellant which would necessitate disciplinary action being taken. Why was nothing done since the latest date of the offences was just over a year before they made that so called erroneous statement to the Public Services Department while supporting the appellant's request for optional retirement? The delay in taking action must surely, in these circumstances and based on the authorities, be an act of condonation. As for the punishment, however, nowhere can we find that the police disciplinary authority had acted beyond its powers but if the issue of condonation had been taken into consideration, the trial Judge's decision would surely have been the other way.

It is settled law that in a judicial review by way of a *certiorari* application, the Court is only concerned with the decision-making process and not with the decision. It is not an appeal from the decision made but a review of the manner in which it was made and it is not the Court's function to consider whether on the merits of the facts of the case, the said decision was fair and reasonable.

However, before us, learned Counsel for the appellant had raised a new point not raised before the learned trial Judge and since the learned Senior Federal Counsel had no objections, and based on the Federal Court decisions in *Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55 and in *Letchumi & Anor. v. The Asia Insurance Co. Ltd.* [1972] 2 MLJ 105, the English Court of Appeal's finding *Connecticut Fire Insurance Co. v. Kavanagh* [1892] AC 473, this Court's judgments in *Mohd. Azam Shuja & Ors. v. United Malayan Banking Berhad* [1995] 2 MLJ 851 and in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 2 CLJ 771; [1996] 1 MLJ 261 and in view of r. 18(2) of the Rules of the Court of Appeal 1994, we had allowed this point to be argued.

The regulations, according to learned Counsel for the appellant, had been made under s. 96 of the Police Act 1967 (hereinafter 'the Act') read with s. 2 of the Emergency (Essential Powers) Ordinance No. 2 1969 (hereinafter 'Ordinance 2/69'), dated 24 February 1970 and published on 28 February 1970. However, he added they were no longer in force when the charges were made against the appellant by the respondent's letter dated 10 October 1991.

This was because, he continued, the Yang di-Pertuan Agong had promulgated on 19 February 1971 the Emergency (Essential Powers) Ordinance No. 77 1971 (hereinafter 'Ordinance 77/71'), where at s. 3 it is clearly stated that, "The Emergency (Essential Powers) Ordinance No. 2 1969 is hereby repealed." with no saving provision.

He further went on to submit that there was an attempt to validate all essential regulations by s. 13 of the Emergency (Essential Powers) Act 1979 (hereinafter 'the 1979 Act') which came into force on the 20 February 1971 and it is appropriate to reproduce the said section here:

> 13. Repeal and saving.
>
> (1) The Emergency (Essential Powers) Ordinance 1969 is hereby repealed.
>
> (2) Notwithstanding sub-s. (1), all subsidiary legislation made under the said Ordinance and in force immediately before 20 February 1971 shall (without prejudice to the power to amend the same by any subsidiary legislation made under the appropriate provision of this Act and subject to such modifications as may be necessary to bring such subsidiary legislation into conformity with this Act) continue in force until repealed or replaced by subsidiary legislation made under the appropriate provision of this Act, and shall be deemed to have been made thereunder.

Sub-section (1) of s. 96 of the Act confers the powers to make "Police Regulations" on the Yang di-Pertuan Agong and in particular, as stated in para. (b) of sub-s. (2), on matters relating to discipline. By virtue of sub-s. (1) of s. 2 of Ordinance 2/69, the executive authority of Malaysia referred to in Article 39 of the Federal Constitution and all powers and authorities conferred on the Yang di-Pertuan Agong by any written law are delegated to a director of operations who shall be a person designated by the Yang di-Pertuan Agong. As stated by learned Counsel for the appellant Ordinance 2/69 had been repealed by Ordinance 77/71 on 19 February 1971 with no saving clause. Does that mean the regulations are no longer in force?

Before we answer that question, it is pertinent to refer to the 1979 Act where at s. 13, as reproduced earlier, despite the repeal of the Ordinance, it saves all subsidiary legislation made under it and in force immediately before 20 February 1971 until repealed or replaced by subsidiary legislation made under the 1979 Act. However, the said section must surely refer only to the first Emergency Ordinance or Ordinance 1 called the Emergency (Essential Powers) Ordinance 1969 as seen from the heading and short title of that Ordinance without any reference to its number, in which case it follows that Ordinance 2/69 is not affected and it cannot, therefore, be argued that the subsidiary legislation under Ordinance 2/69 have been saved by the 1979 Act.

According to s. 28 of the Interpretation Acts 1948 and 1967 (hereinafter 'Act 388'), where a written law repeals in whole or in part any former written law and substitutes other provisions therefor, subsidiary legislation made under the repealed law shall, in so far as it is not inconsistent with the substituted provisions, remain in force until revoked or replaced by subsidiary legislation made under the repealing law, and shall be deemed for all purposes to have been made thereunder. In normal circumstances, this would mean that the Regulations under Ordinance 2/69 would continue in force until revoked or replaced by subsidiary legislation made under Ordinance 77/71. However, s. 2 of Act 388 states that Part I of that Act, which includes s. 28, only applies to the following:

2. Application.

(1) Subject to this section, Part I of this Act shall apply for the interpretation of and otherwise in relation to:

(a) this Act and all Acts of Parliament enacted after 18 May 1967;

(b) all laws, whether enacted before or after the commencement of this Act, revised under the Revision of Laws Act 1968;

(c) all subsidiary legislation made under this Act and under Acts of Parliament enacted after the commencement of this Act;

(d) all subsidiary legislation, whether made before or after the commencement of this Act, revised under the Revision of Laws Act 1968;

(e) all subsidiary legislation made after 31 December 1968, under the laws revised under the Revision of Laws Act 1968.

(2) Part I shall not apply for the interpretation of or otherwise in relation to any written law not enumerated in sub-s. (1).

(3) Part I shall not apply where there is:

(a) express provision to the contrary; or

(b) something in the subject or context inconsistent with or repugnant to its application.

Further, s. 3 of Act 388 defines 'Act' or 'Act of Parliament', used with reference to legislation, as a law made by Parliament. This strongly indicates that emergency legislation is excluded from the provisions of Act 388 and we are therefore back where we started.

To prove his point further, learned Counsel for the appellant had referred to *Guru Prasanna Singh's Principles of Statutory Interpretation* 5th Edn., 1992 at p. 396 which says:

> As a consequence of the general principle that a statute after its repeal is as completely effaced from the statute book as if it had never been enacted, subordinate legislation made under a statute ceases to have effect after repeal of the statute. This result can be avoided by insertion of saving clauses providing to the contrary.

and he had cited *Watson v. Winch* [1916] 1 KB 688, *Harish Chandra v. State of Madhya Pradesh* AIR [1965] SC 932 and *Daihatsu (Malaysia) Sdn. Bhd. v. Pendakwa Raya* [1987] 1 MLJ 88 as relevant authorities.

As an alternative submission, he had argued that there had been a wrongful delegation of powers to the director of operations to make regulations. The Federal Court had held in *Johnson Tan Han Seng v. Public Prosecutor and 3 Other Cases* [1977] 2 MLJ 66 that what the Attorney-General was required to decide in those cases was in truth a function of His Majesty's legislative power and that cannot be done as it "would involve a delegation by His Majesty of his legislative power which is invalid as going too far and amounting to an abandonment of his function and duty".

Legislatively, ss. 3 and 11 of the Delegation of Powers Act 1956 (hereinafter 'the DOPA') are relevant. Sections 3 and 11 of the DOPA reads:

> 3. Power of Yang di-Pertuan Agong to delegate power and duties.
>
> Where by any written law the Yang di-Pertuan Agong is empowered to exercise any powers or perform any duties, he may, subject to s. 11, by notification the Gazette, delegate subject to such conditions and restrictions as may be prescribed in such notification the exercise of such powers or the performance of such duties to any person described by name or office.
>
> 11. No delegation of power to make regulations.
>
> Nothing in this part shall apply to any power to make regulations conferred upon any person by any written law.

Before we get dizzy on the merry-go-round, it is best to examine the submissions of learned Senior Federal Counsel for respondent. According to him, the regulations were made under the Act and the Director of Operations had made them under Ordinance 2/69 by virtue of an instrument delegating the power to him. As for the delegation of power by the Yang di-Pertuan Agong sub-s. (1) of s. 2 of the DOPA has clarified that in Part II therein, which includes both ss. 3 and 11, the express "written law" does not include the Federal Constitution. In consequence, his contention was that the DOPA did not apply to a delegation of power by the Yang di-Pertuan Agong under the Federal Constitution.

He stressed that any adjournment of the disciplinary hearing was at the discretion of the presiding officer and as far as the respondent was concerned, it had been exercised reasonably and the appellant had been given a right of hearing. He added that in judicial review cases, there is no right to an oral hearing and Counsel need not be present at the hearings at all times. There was also evidence, he said, to suggest that the respondent knew what the appellant had done earlier and as for the delay, he submitted that it was possible that the respondent discovered the misdeeds only in 1990 and 1991.

We must admit that we were quite taken aback by the brevity of the submissions of learned Senior Federal Counsel considering the lengthy arguments of learned Counsel for the appellant and directed him to submit more fully in writing.

This he did, beyond the two-week period we gave him, where he had elaborated on his oral submissions and had referred to cl. (2) of Art. 150 of the Federal Constitution which states:

> (2) A Proclamation of Emergency under cl. (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.

and had concluded that the said provision enables the Yang diPertuan Agong under a proclamation of emergency to make Ordinances having the force of law when Parliament is not sitting, that all Emergency Ordinances have the force of law and that the Yang di-Pertuan Agong could validly delegate his powers to the Director of Operations to make the regulations.

He went on to submit that the DOPA is a general law and the general provisions therein cannot in any way override the special provisions of sub-s. (1) of s. 2 of Ordinance 2/69 and cl. (2) of Art. 150 of the Federal Constitution on the principle of *generalibus specialia derogant*. He had cited *Public Prosecutor v. Chew Siew Luan* [1982] 2 MLJ 119 where the Federal Court had stated that *generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law and it would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear.

He had also referred to *Public Prosecutor v. Khong Teng Khen & Anor.* [1976] 2 MLJ 166 where the question posed to the Federal Court was as regards the validity of the Essential (Security Cases) Regulations 1975 (hereinafter 'ESCAR') and the subsequent amendments in the light of Article 150 of the Federal Constitution. In a two to one judgment, the Federal Court ruled that:

(a) the ESCAR were made not under cl. (2) of Art. 150 of the Federal Constitution but under s. 2 of the Emergency (Essential Powers) Ordinance 1969, and therefore the fact whether or not they were made when Parliament was sitting was irrelevant;

(b) by virtue of sub-s. (4) of s. 2 of the Emergency (Essential Powers) Ordinance 1969, the ESCAR were valid notwithstanding that they are inconsistent with the Federal Constitution, but in fact it had not been shown that they were inconsistent with the Federal Constitution;

(c) it is lawful for the Yang di-Pertuan Agong to delegate under s. 2 of the Ordinance power to himself to make regulations inconsistent with the Federal Constitution;

(d) the ESCAR do not have to comply with Art. 149 of the Federal Constitution as they were made not under the authority of that Article but under the authority of Art. 150;

(e) the Emergency (Essential Powers) Ordinance 1969, were properly and validly promulgated under cl. (2) of Art. 150 of the Federal Constitution;

(f) the ESCAR were not *ultra vires* s. 2 of the Emergency (Essential Powers) Ordinance 1969, as the power to make regulations under sub-s. (2) of s. 2 is expressed to be without prejudice to the generality of the powers conferred by sub-s. (1) of s. 2 which gives the Yang di-Pertuan Agong wide powers to "make any regulations whatsoever which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community" and also because para. (j) of s. 2(2) of the Ordinance expressly gives power to the Yang di-Pertuan Agong to make essential regulations amending the law, suspending the operation of any written law and applying any written law with modification.

In his dissenting speech, Ong Hock Sim FJ said:

The question of delegation was likewise dealt with in *Eng Keock Cheng v. Public Prosecutor* [1966] 1 MLJ 18 where Wylie CJ (Borneo) said:

> The true effect of Art. 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are

> involved. This necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution ... .

Pending our decision, learned Counsel for the appellant had thereafter requested for permission to file in further written submissions in reply to the learned Senior Federal Counsel and we had allowed it in view of the complexity of the matter.

In his subsequent submissions, he had stated that the only issue is whether the Yang di-Pertuan Agong can delegate to the Director of Operations designated under Ordinance 2/69 the Yang di-Pertuan Agong's legislative powers under s. 96 of the Act.

Sub-section (1) of s. 2 of Ordinance 2/69 states:

> 2(1) The executive authority of Malaysia referred to in Art. 39 of the Constitution and all powers and authorities conferred on the Yang di-Pertuan Agong by any written law are hereby delegated to a Director of Operations who shall be a person designated by the Yang di-Pertuan Agong.

He argued that at first blush, this provision appears to be in direct conflict with s. 11 of the DOPA. In such a case, he added, the various rules of statutory interpretation and canons of construction may have to be resorted to, determine which law will prevail. His submission was that the first duty of the Court in the face of an apparent repugnancy or conflict is to endeavour to reconcile the two conflicting legislation so far as it is consistent with the language used.

In *Statutory Interpretation* by Donald Gifford (1990 Edn.), the learned author citing *Proprietors of Strata Plan No. 159 v. Parramatta City Council* [1985] 55 LGRA 363 said at p. 105:

> The Courts are far from eager to discover inconsistencies in the statutes. They have no wish to impute to Parliament incompatible legislation, "So far as is consistent with the language used, Courts should endeavour to reconcile legislation, so that the provisions of several Acts can operate harmoniously with each other."

And at pp. 107 and 108, the said author continues:

> ... sometimes the Court's best efforts at reconciliation end in failure, and it is necessary for one statute (at least to some extent) to override the other. In the ordinary course it will be the later Act which will prevail. The current Parliament "cannot invalidate future Acts of Parliament" and it cannot bind its successors. This necessarily follows from the fact that parliaments are elected from time to time: it would be absurd to suppose that legislation brought forward by a

government that has long since lost office could never be repealed or amended by any subsequent legislature. The current Parliament, of course, possesses the power to correct the mistakes made by its predecessors.

In *Low Chang Hian v. Kelab Golf DiRaja Selangor* [1995] 2 CLJ 309; [1995] 3 MLJ 1, K.C. Vohrah J, states at p. 5:

> Richard Talalla J has succintly summarised the principles and the case law to be used in construing rules which appear to conflict in *PB Securities Sdn. Bhd. v. Abdul Rashid bin Mohamed* [1994] 3 CLJ 209 at p. 210; [1994] 3 MLJ 168 at p. 171B-D:
>
> > As to the principles to be applied in construing the Rules, in *Proprietors of Strata Plan No. 159 v. Parramatta City Council* [1985] 55 LGRA 363 at p. 364, per Kirby P (NSW) CA it was stated that so far as is consistent with the language used, Courts should endeavour to reconcile legislation, so that the provisions of several Acts can operate harmoniously with each other. In *Barker v. Edger and Others* [1898] AC 748 at p. 754, per Lord Hobhouse (PC) it was said that when the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms. The same canon of construction has also been applied to the English Rules of the Supreme Court, see *Hasker v. Wood* [1885] 54 LJQB 419 and *Bostock v. Ramsey Urban District Council* [1900] 1 QB 357; [1900] 2 QB 616 and the County Courts, see *Reeve v. Gibson* [1891] 1 QB 652.

That case, of course, dealt with the apparent conflict between O. 14 and O. 32 r. 13(2) of the Rules of the High Court 1980.

Learned Counsel for the appellant was of the opinion that if the words "powers and authorities" in sub-s. (1) of s. 2 of Ordinance 2/69 are read as or construed to include legislative powers and authorities, then it is clearly in conflict with s. 11 of the DOPA. Having regard, however, to the two authorities cited earlier, he submitted that the Court should attempt to reconcile the two provisions before finding that there is actually a conflict.

His view was that they are not in that the words "powers and authorities" do not include legislative powers and authorities despite the use of the word "all" before them because of what s. 8 of Ordinance 2/69 states and because of the word "executive" at the beginning of s. 2. He said the words "all powers and authorities" appearing after the words "executive authority of Malaysia" must take its colour from the word "executive".

As for s. 8 of Ordinance 2/69 it states:

> For the purpose of this Ordinance the Director of Operations may make essential regulations under s. 2 of Emergency (Essential Powers) Ordinance No. 1 1969, for any or all of the purposes as set out in that section.

Learned Counsel continued by saying that clearly, therefore, s. 8 of Ordinance 2/69 already conferred on the Director of Operations legislative powers and would be totally redundant if s. 2(1) of Ordinance 2/69 were to be construed as including the delegation of legislative powers. The principle that a lawmaker does not waste unnecessary words or make unnecessary laws would militate against such a construction of sub-s. (1) of s. 2 of Ordinance 2/69. This is illustrated in *Murphy v. Duke* [1985] 2 All ER 274 where it was held at p. 280:

> It seems to me that, if, in fact, the process of selling goods in the way that this organisation sells them were to be a transaction property called a 'collection' under the 1939 Act, then it would have been wholly unnecessary for Parliament to have passed the 1958 Act. It would be quite unnecessary to say that you should be committing an offence if you represent that the goods have been made by blind people in selling those goods if the mere selling brought you into conflict with the 1939 Act. Parliamentary time is sufficiently precious for Parliament not to pass unnecessary Acts of Parliament. It seems to me that this Act would have been quite unnecessary had the activity of selling goods of these descriptions in those circumstances already been a breach of the requirements of the 1939 Act. It seems to me that you can read the two Acts very easily together because the 1958 Act singles out, as the activity, in the course of which representations must not be made, the activity of selling or soliciting orders for goods of any description, whereas the 1939 Act singles out for treatment the activity of giving whether for a consideration or not money or other property. Those seem to me to be two stark appositions and the 1939 Act cannot be said, having regard to the 1958 Act, to be dealing with sales.

If s. 2 of Ordinance 2/69 is held to exclude the delegation of the Yang di-Pertuan Agong's legislative powers, then it is consistent and not in conflict with s. 11 of the DOPA. It would then follow that the regulations are invalid as the Director of Operations made them pursuant to his purported powers when no such powers have been delegated to him under that section.

His alternative submission was that if that relevant provision is held to delegate the Yang di-Pertuan Agong's legislative powers to the Director of Operations and therefore in conflict with s. 11 of the DOPA, then the latter would prevail over the former because of s. 23 of Act 388 which provides:

> 1. Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.
>
> 2. In this section "Act" includes a federal law styling itself an Ordinance or Enactment.

He further argued that the DOPA is a Federal law but Ordinance 2/69 is not as it was made not by Parliament but by the Yang di-Pertuan Agong pursuant to cl. (2) of Art. 150 of the Federal Constitution upon the proclamation of an emergency. At best, he added, Ordinance No. 2/69 is only subsidiary legislation being a law made pursuant to a lawful authority and having legislative effect.

Learned Counsel contended that he is reinforced in his aforesaid submission by the fact that by the Constitution (Amendment) Act 1981 (Act A514), cl. (2C) of Art. 150 was added and which provides that an Ordinance promulgated under the new cl. (2B) shall have "the same force and effect as an Act of Parliament and shall continue in full force and effect as if it is an Act of Parliament." However, this deeming provision only came into force on 15 May 1981. It is clear, he added, that Parliament itself recognised the fact that any Ordinance so promulgated has no status or effect as an Act of Parliament and saw it fit to enact a deeming provision to deem it to have the force and effect of an Act of Parliament. It is also pertinent, he said, to note that cl. (2C) of Art. 150 of the Federal Constitution has no retrospective effect and could not, in any event, have been meant to resurrect the status and effect of an Ordinance, namely Ordinance 2/69, long repealed in 1971 and which was promulgated under the old cl. (2) of Art. 150. As such, it was his submission that Ordinance 2/69 was subsidiary legislation and the DOPA an Act for the purpose of s. 23 of the Act 388 and sub-s. (1) of s. 23 thereof would apply and would render that part of sub-s. (1) of s. 2 of Ordinance 2/69 void for being inconsistent with s. 11 of the DOPA in so far as sub-s. (1) of s. 2 of Ordinance 2/69 purported to delegate legislative powers of the Yang di-Pertuan Agong to the Director of Operations and, therefore, it follows that the Director of Operations again had no power to make the regulations which are consequently invalid.

He referred to cl. (8)(b)(iii) of Art. 150 of the Federal Constitution which provides as follows:

> (8) Notwithstanding anything in this Constitution:
>
> (a) ...; and
>
> (b) no Court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground regarding the validity of –
>
> (i) ... ;
>
> (ii) ... ;
>
> (iii) any Ordinance promulgated under cl. (2B); or
>
> (iv) ... .

It would appear, he said, again at first blush, that the said provision ousts the jurisdiction of this Court from enquiring into the validity of Ordinance 2/59. It is, however, clear upon closer analysis, that the said provision has no application in the instant case as Ordinance 2/69 was promulgated under the old cl. (2) of Art. 150, and not cl. (2B) of Art. 150 which only came into effect on 15 May 1981 as amended by Act A514. Clause (6) of Art. 150 of the Federal Constitution also has no application as it speaks of an inconsistency with the Federal Constitution not an inconsistency with an Act of Parliament or a federal law namely the DOPA.

Learned Counsel for the appellant further submitted that if the Court held that there was a conflict between the two provisions and that Ordinance 2/69 is not subsidiary legislation, the maxim *generalia specialibus non derogant* applies, contrary to what the learned Senior Federal Counsel submitted, in favour of the appellant.

He said that this was because it is an Act specifically enacted to deal with, as stated by its long title, the expressed subject of "the delegation of certain statutory powers and duties and the signing of certain documents." As stated in *Barker v. Edger and Others (supra)*, when a legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. On the other hand, he said, Ordinance 2/69, while promulgated by the Yang di-Pertuan Agong after the proclamation of emergency in 1969, dealt generally with the functions, powers and authorities of the Director of Operations. The fact that Ordinance 2/69 is a later law is not conclusive. Firstly, the rationale behind the principle that a later law will prevail over an earlier one is based on the concept that Parliament is supreme and an earlier Parliament cannot bind a later Parliament, and therefore a later Parliament can make a law inconsistent with a law made by an earlier Parliament and such a later law may prevail over the earlier law. The cases cited in support include the case of *R v. Camberwell City Council, ex parte Heller & Gocs* [1965] VR 491. It is, however, obvious, he added, that in our instant case, we are not concerned about a later law namely Ordinance 2/69 made by Parliament as it was made by the Yang di-Pertuan Agong and the aforesaid principle based on Parliamentary supremacy can have no such application.

Secondly, a special law earlier in time may still prevail over a later general law. In *Sanwarmal Kejriwal v. Vishwa Co-Operative Housing Society Ltd.* AIR [1990] SC 1563, the Supreme Court of India said at p. 1575:

> It was, however, submitted by the learned Counsel for the society that the earlier enactment i.e. the Rent Act must yield to the later Act, i.e. the Societies Act, if the competing provisions of the two cannot be reconciled – *lex posterior derogat priori*. But the Rent Act is a special law extending protection to tenants, just as the Industrial Disputes Act which makes provision for the benefit of the workmen. Ordinarily, therefore, a general provision, a dispute touching the business of the society, would have to give way to the special provision in the Rent Act on the maxim *generalia specialibus non derogant*. That is why this Court harmonised the said provisions by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Societies Act, should apply.

Even if the regulations may be termed as subsidiary legislation which have not been repealed, learned Counsel had continued, the fact that remains is that the Director of Operations derived his powers to make the regulations from s. 96 of the Act read together with sub-s. (1) of s. 2 of Ordinance 2/69. He added that if either of the combined sources of power is repealed namely in this case Ordinance 2/69, then such subsidiary legislation made under the combined sources, even though it may properly be termed as subsidiary legislation of the unrepealed Act or source of power, will be repealed or will cease to have any force unless there are saving provisions which in our case there is none and therefore the regulations have ceased to have effect.

The respondent has also referred to the cases of *Najar Singh v. Government of Malaysia & Anor. (supra)* and *Government of Malaysia v. Mahan Singh (supra)* to support the submission that the regulations are valid. It is the appellant's contention that the question of the validity of the delegation of the legislative powers of the Yang di-Pertuan Agong to the Director of Operations in relation to s. 11 of the DOPA was not in issue in either case. Actually it was, in the latter. In *Najar Singh*, the Privy Council did not deal with the question of the delegation of legislative powers but we cannot assume that there was a proper delegation of the Yang di-Pertuan Agong's legislative powers and that the regulations were valid. In *Mahan Singh*, there was a challenge to the validity of the delegation of the Yang di-Pertuan Agong's powers in Ordinance 2/69. Suffian LP, stated at p. 161 as follows:

> It is argued that the Yang Di-pertuan Agung may delegate only part of his power (see *Eng Keock Cheng*) *(supra)*; that by sub-s. (1) of s. 2 of the Emergency (Essential Powers) Ordinance No. 2 of 1969 published as P.U.(A) 149 on 17 May 1969. His Majesty purported to delegate all his power to the Director of Operations; that this purported delegation amounts to an abdication of His Majesty's power and is invalid, and accordingly reg. 44 made by the Director of Operations in purported exercise of power delegated to him, is void. With all due respect, I do not think there is any merit in this argument. If His Majesty may delegate part of his power he may delegate all of it, and there is no question

of abdication in the instant case: after promulgating Ordinance No. 2 of 1969 His Majesty remained Yang di-Pertuan Agung, still retained such power as he might have wished to exercise, and indeed has since then by P.U.(A) 62/71, s. 3, in exercise of his royal power repealed that Ordinance.

Lee Hun Hoe CJ (Borneo) in his speech at pp. 163, 164 and 165 said:

> There is one matter I would particularly like to touch on, that is, the contention of respondent that the Yang di-Pertuan Agong cannot delegate his powers under the Constitution. Normally, the power to legislate rests with the Yang di-Pertuan Agung (His Majesty) and the two Houses of Parliament, namely, the Dewan Negara (the Senate) and the Dewan Rakyat (the House of Representatives). See Art. 44 of the Constitution. But, where as a result of a national crisis an emergency is declared and Parliament is not sitting then the entire power falls on His Majesty ... Ordinance No. 2 of 1969 provides for the delegation of executive authority of Malaysia and all the powers and authorities concerned on His Majesty by any written law to the Director. This enabled the Director to make regulations to ensure the effective control of security, defence, maintenance of public order and supplies and services essential to the life of the community. Consequently, until Parliament could be summoned the Director could exercise all executive and legislative powers in Malaysia and in exercising such powers he was not subject to control by Parliament ... . In an emergency, the situation not being normal, extraordinary measures may have to be adopted. In such a situation the nation comes first and there is nothing to prevent His Majesty from delegating all his powers both executive and legislative to some other authority. He chose to give such powers to the Director of Operations, who incidentally, happened to be our Deputy Prime Minister. It was a manifest necessity of the time. It would be futile to argue that the delegation of powers by His Majesty or, for that matter, Parliament would be against the Constitution. The short answer to such an argument is provided by Art. 150(6). The wide power given to the Director of Operations lasted as long as the emergency existed. It was temporary in nature. It ceased to exist once Parliament annulled the Proclamation. In my opinion, it is not beyond the powers of His Majesty or Parliament to enact Ordinances No. 1 of 1969 and No. 2 of 1969 and other such Ordinances.

In conclusion, learned Counsel for the appellant submitted that the Yang di-Pertuan Agong could not have delegated the legislative powers conferred on him by s. 96 of the Act and the regulations made by the Director of Operations pursuant to such purported delegated powers are invalid and consequently the disciplinary action taken against the appellant pursuant to the regulations and the resulting demotion of the appellant are null and void.

We had considered those further submissions and are of the view that the words “all powers and authorities” in sub-s. (1) of s. 2 of Ordinance 2/69 must include legislative powers as well especially because that sub-section starts off with “the executive authority... ”. If legislative powers were to be excluded

the word "all" would not have been used at all and the word "executive" would have been more apt and appropriate.

As for s. 8 of Ordinance 2/69, it only refers to legislative powers to be exercised by the Director of Operations under the earlier Ordinance 1/69. This obviously is for two reasons. Firstly, there is no necessity to give him the legislative powers under Ordinance 2/69 as that is already delegated to him under s. 2 thereof, which only reinforces our earlier finding, and secondly, this is because he had not been given the said powers under the earlier emergency Ordinance.

Whether this delegation of powers is in direct conflict with s. 11 of the DOPA must be answered in the negative because the DOPA does not apply to the Federal Constitution under which Ordinance 2/69 is made. Our conclusion coincides with the earlier findings of the Privy Council in *Najar Singh v. Government of Malaysia (supra)* and the Federal Court's decision in *Government of Malaysia v. Mahan Singh* which both state that the regulations are valid although the validity of the delegation of the legislative powers by the Yang di-Pertuan Agong was not the main issue in either case.

Having said that and although at first we were inclined to agree with learned Counsel for the appellant that the regulations were no longer in force in view of the repeal by Ordinance 77/71 of Ordinance 2/69 with no saving clause, a closer look at the opening paragraph of the regulations indicate that they were actually made under the Act which is still in force as it has never been repealed. Accordingly, the subsidiary legislation thereunder namely the regulations are still in force and the Orders made thereunder by the police disciplinary authority had been validly made although the maker empowered by delegation namely the Director of Operations now no longer exists.

However, in view of the doctrine of condonation, we are of the considered opinion that the charges against the appellant cannot stand and accordingly, we allow this appeal with costs here and below, set aside the order of the Court below, order that the appellant be reinstated to the rank of Sub-inspector from the date of the reduction of his rank to Sergeant Major by the police disciplinary authority up to the date of his previously approved optional retirement on 1 December 1991, and order that the deposit be refunded to the appellant.

Reported by Harjit Singh Pannu